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Nos. 02-1093, 02-1101

Supreme Court, U.S.
FILED
MAR 11 2003
CLERK

In The
Supreme Court of the United States

CITY OF SAN DIEGO,

Petitioner,

v.

PHILIP K. PAULSON,

Respondent.

MT. SOLEDAD MEMORIAL ASSOCIATION, INC.,

Petitioner,

v.

PHILIP K. PAULSON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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34 pp

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INTRODUCTION

Plaintiff/Respondent Philip Paulson submits this Opposition Brief in response to the Petitions for a Writ of Certiorari filed by Defendant/Petitioner City of San Diego (Case No. 02-1093) and Defendant/Petitioner Mt. Soledad Memorial Association (Case No. 02-1101).

Petitioners assert three grounds why the Court should review the decision in this matter. First, they claim that the Ninth Circuit misinterpreted article XVI, section 5, of California Constitution. The claim presents a pure question of state law and accordingly fails to satisfy the standard for certiorari review. The claim fails as well on the merits. The Ninth Circuit carefully applied California precedent to the factual record and properly concluded that the terms of the challenged sale impermissibly conferred a significant advantage upon bidders seeking to preserve the Mt. Soledad cross. As set forth below, the errors assigned to this analysis by Petitioners rest on serious distortions of the record, the law, and Petitioners' own representations to the lower courts.

Petitioners' second argument rests on a mischaracterization of the record as well. Petitioners claim that the opinion violates the federal constitutional rights of religious bidders based upon the purported fact that the ruling requires either (1) the destruction of the cross prior to any future sale or (2) a subsidy by the City only to those bidders seeking to erect a nonreligious display. The decision of the Ninth Circuit, however, says nothing regarding the terms of any required outcome; it merely remands the matter to the District Court to fashion a remedy in the first instance. Moreover, Respondent specifically disavows the two outcomes postulated by Petitioners, and will argue

on remand in favor of other remedial steps which indisputably preserve the rights of all future bidders – religious and nonreligious – to scrupulously equal treatment. At a minimum, Petitioners' request for review of such a speculative remedy should await the day that some court actually orders it.

Finally, Petitioners argue that the Association's present occupancy of the property gives rise to a "vested" entitlement to continue in possession irrespective of the constitutionality of the challenged transaction. The argument contravenes the most basic principles of judicial review. Having been placed on notice of Respondent's intention to challenge the sale, the Association took title to the property under cloud and subject to any remedial order that might be entered in this proceeding. The Association cannot strip the federal courts of their ability to decide the constitutionality of the challenged transaction on grounds that it has rooted itself upon the property and is now immune, as a matter of constitutional right, from eviction.[1]

The opinion of the Ninth Circuit is grounded firmly upon the record and the law. The Petitions should be denied.

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[1] The City also volunteers an extended discussion of the merits of Respondent's Establishment Clause claim, despite the fact that the Ninth Circuit's opinion does not reach the question. (City of San Diego's Petition for a Writ of Certiorari ["City"] pp. 22-26) There is accordingly no ruling for this Court to review.

FACTUAL BACKGROUND

This case involves a 43-foot tall, 24-ton cross at the apex of a public park atop a prominent mountain in the City of San Diego. In an earlier phase of the litigation, the District Court ruled that the City's display of the cross violated the California Constitution. *Murphy v. Bilbray*, 782 F. Supp. 1420 (S.D. Cal. 1991). Petitioners appealed and lost. *Ellis v. City of La Mesa*, 990 F.2d 1518 (9th Cir. 1993), *cert. denied*, 513 U.S. 925 (1994). The case returned to the District Court to enforce the judgment.

Petitioners first arranged a negotiated sale of the cross and a fifteen-foot circle of land at its base to the Association, which had constructed the cross in 1954 and is committed to its preservation. The sale was authorized by the electorate's passage of Proposition F, which permitted the sale of the property for use as an "historic war memorial." The ballot argument submitted by the Mayor and three council members urged that "ONLY A 'YES' VOTE ON PROPOSITION F CAN SAVE THE CROSS." (Appellant's Excerpts of Record ["ER"] 26) The District Court struck down that transaction in 1997 on grounds that the sale of the cross to an entity committed to its preservation, for the express purpose of saving the religious monument, did not remedy the violation and itself breached the California Constitution. (ER 9-15)

Relying again on Proposition F, the City next proposed an open-bid transaction that continued to impose upon all purchasers the requirement that the property be used as an "historic war memorial" – a restriction mirroring the Association's longstanding characterization and intended use of the cross. (ER 29) The City ranked bidders based on their "expertise" in maintaining war memorials – again to

the benefit of the Association, which had maintained the cross for the preceding half century. (ER 18-20, 29) Finally, the City retained complete discretion to accept or reject any bid without cause. (ER 19) The Association, which offered the highest of the five bids submitted, was again awarded the property. (Appellee Mt. Soledad Memorial Association's Excerpts of Record ["Assoc. ER"] 1-2)

Respondent again moved to enforce the injunction on grounds that the sale neither remedied the constitutional breach nor complied with the state or federal Constitutions. The District Court upheld the transfer. (ER 116-124) Respondent appealed. The Ninth Circuit, sitting *en banc*, reversed on grounds that the transaction impermissibly favored bidders seeking to preserve the cross in violation of article XVI, section 5, of the California Constitution. *Paulson v. City of San Diego*, 294 F.3d 1124 (9th Cir. 2002) (*en banc*).

The Court of Appeals' analysis focused on the war-memorial use restriction that the City imposed as a condition of sale, coupled with the fact that the City deemed the existing cross to be precisely such an "historic war memorial" for purposes of satisfying that restriction. As the Court explained, these terms skewed the sale in favor of bidders seeking to preserve the religious symbol, for they alone did not have to incur the substantial additional expense of removing the cross and erecting a new memorial in its place. 294 F.3d at 1129-34. The Ninth Circuit concluded that this unequal burden placed upon bidders seeking to erect a non-Christian memorial was squarely at odds with the considerable body of California case authority

construing the No Aid Clause of the California Constitution.[2] *Id.*

ARGUMENT

I. THE NINTH CIRCUIT'S ADJUDICATION OF A SUPPLEMENTAL STATE LAW CLAIM IS NOT AN APPROPRIATE BASIS FOR THE EXERCISE OF CERTIORARI JURISDICTION.

Both Petitioners urge the Court to exercise its certiorari jurisdiction for purposes of reviewing the Ninth Circuit's application of California constitutional law principles. The request should be denied.

A. The Ninth Circuit Properly Decided The Case On The Basis Of The California Constitution.

Petitioners argue that the Ninth Circuit committed a "procedural abuse of discretion" by "ignor[ing] the properly briefed and argued federal constitutional question before it" and deciding the case instead on the basis of the California Constitution. (City, p. 6) The argument conflicts

[2] The opinion also answers Petitioners' repeated claim that the sale was "scrupulously neutral" and "for [an] undeniably secular purpose. . . . " (City, pp. 5, 17) Pointing to the fact that the sale required purchasers to use the property as an *historic* war memorial, pursuant to the language of Proposition F, the Ninth Circuit noted that the requirement could only be satisfied by the cross itself – and, thus, that the City evinced "a subjective [sectarian] goal" in its design of the transaction. 294 F.3d at 1132 n.5.

with a century of precedent governing the adjudication of federal constitutional questions.

It is long-settled that the federal courts should not reach federal constitutional issues when alternative state-law grounds are available. *Siler v. Louisville & Nashville R.R.*, 213 U.S. 175, 193 (1909); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 294-95 (1982); *Clinton v. Jones*, 520 U.S. 681, 690 n.11 (1997). This rule applies even when the alternative ground rests on state constitutional law. *See Askew v. Hargrave*, 401 U.S. 476, 478 (1971); *Reetz v. Bozanich*, 397 U.S. 82, 85 (1970); *see also Hewitt v. Joyner*, 940 F.2d 1561, 1565 (9th Cir. 1991). Accordingly, the Ninth Circuit properly decided this case on the basis of the California Constitution, as required to avoid the adjudication of Respondent's federal constitutional claim.

B. The Adjudication Of A Supplemental State Law Claim Does Not Meet The Standards For Certiorari Review.

The proposition that this Court rarely exercises its certiorari jurisdiction to review supplemental state law claims is manifest; the Court exists to resolve questions of national significance bearing on matters of federal law. Sup. Ct. R. 10. As the Court stated in *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983), "[w]e emphasize . . . that, standing alone, a challenge to state-law determinations by the Court of Appeals will rarely constitute an appropriate subject of this Court's review." *See, e.g., Duncan v. Tennessee*, 405 U.S. 127 (1972) (federal question "so interrelated with rules of criminal pleading peculiar to the State of Tennessee . . . as not to warrant the exercise of the certiorari jurisdiction of this Court"). Moreover, even in circumstances where the resolution of a state law question is

integral to the adjudication of a federal question, the Court affords "great deference to the interpretation and application of state law by the courts of appeals." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 484 n.13 (1986); *McMillian v. Monroe County, Alabama*, 520 U.S. 781, 786-87 (1997); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737-38 (1989). As set forth below, such deference is wholly warranted in this case.

C. The Ninth Circuit Properly Decided The No Aid Clause Question.

The Ninth Circuit interpreted California's No Aid Clause in a manner fully consistent with the record and the law. Far from taking "free reign [*sic*] to exercise broad discretion in matters pertaining to state constitutional issues" (City, p. 13), as Petitioners allege, the Ninth Circuit's opinion reflects complete fidelity to the controlling authority of the California courts. It fully merits the great deference that this Court's precedents command.

1. The State Constitutional Question Was Properly Raised And Briefed Before The Ninth Circuit.

As an initial matter, both Petitioners claim that the Ninth Circuit's disposition of Respondent's No Aid Clause claim was made "without any briefing or argument." (City, p. 4, 12; Mt. Soledad Memorial Association's Petition for a Writ of Certiorari ["Assoc."], p. 7) The assertion conceals the dispositive fact that Respondent raised the claim in his Opening Brief and that Petitioners themselves ignored the argument thereafter. To assert now that their own failure to address the claim somehow undermines the validity of

the Ninth Circuit's ruling, and supports the proposition that this Court should revisit the question, is quite remarkable.

Respondent argued in the District Court that the challenged sale violated the No Aid Clause. (Plaintiff's Br., filed September 13, 1999, pp. 7, 9-10) The District Court accordingly addressed the claim. (ER 118-19) Respondent reiterated the argument on appeal. (Appellant's Opening Br., filed July 19, 2000, pp. 8-9, 12-14, 20) In opposition, the City and the Association both ignored the contention. The original three-judge panel nevertheless considered the claim and rejected it. 294 F.3d at 1137 n.2.

Respondent's petition for *en banc* rehearing and supplemental *en banc* brief did not focus on the No Aid Clause, reflecting the predominant focus of the decision from which rehearing was sought. However, the Ninth Circuit ordered the filing of additional copies of all original briefing pursuant to standard Circuit procedure and in recognition of the obvious fact that *en banc* rehearing rests upon the entire appellate record, not merely the supplemental submissions. *Socop-Gonzalez v. I.N.S.*, 272 F.3d 1176, 1186 n.8 (9th Cir. 2001) (*en banc*) ("the *en banc* court acts as if it were hearing the case on appeal for the first time"); *see* Ninth Circuit Rule 31-1; Nelson, *et al.*, NINTH CIRCUIT APPELLATE PRACTICE, 11:270 (2001) ("Supplemental [*en banc*] briefs should be limited to the issues identified in the court's order. Unless ordered to do so, the parties should not rebrief issues covered in their earlier briefs.").

Petitioners' assertion that the Ninth Circuit decided the case on an unbriefed claim is accordingly false. The constitutional provision was left unaddressed only by Petitioners themselves, who chose to ignore a claim squarely raised in the Opening Brief.

2. The No Aid Clause Commands Governmental Neutrality, Not Nativist Bias.

Without citation to the constitutional convention that adopted the No Aid Clause or the succeeding century of precedent construing it, Petitioners declare that the provision is a poisoned product of "anti-Catholic animus." (City, p. 8; Assoc., p. 12)

Petitioners acknowledge, as they must, that "on its face the No Aid Clause purports to generally prevent government aid to religion. . . . (City, p. 7) In an attempt to transform the plain language of the provision into something new, Petitioners advance the novel proposition that the Clause is actually "based on" the nativist Blaine Amendment that was considered and rejected by Congress four years prior to California's adoption of the No Aid Clause. (*Id.*; Assoc., p. 12) In attempting to establish this purported relationship, Petitioners rely on two law review footnotes and a website link. They are not well served by their sparse authority.

One commentator upon whom the City relies says nothing about article XVI, section 5, mentioning California only in a footnote that lists twelve states whose constitutions "impose more general restrictions on aid" to religious schools. Viteritti, *Blaine's Wake: School Choice, The First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y, 657, 675 n.88 (1998). The other commentator again says nothing about the creation of the No Aid Clause, merely listing California in a footnote among twenty-five states whose constitutions "contain so-called Blaine Amendments." Taylor, *The Costs of Denying Religious Organizations The Right to Staff On A Religious Basis*, 12 Geo. Mason U. Civ. Rts. L.J., 159, 192-93 n.125

(2002). Petitioners' website link does nothing more than quote the language of the No Aid Clause under the heading, "Blaine Amendments-California." (City, p. 8 n.9; Assoc., p. 12 n.4) Offering no analysis, no historical evidence, and no citation to any authority, Petitioners simply declare that these three trivial references establish "the shadowy past" of the No Aid Clause. (City, p. 7)

This feeble attack is at odds with every legitimate interpretive source. In the words of a California court over fifty years ago,

> [r]eference to the debates of the constitutional convention which presented the Constitution of 1879 to the people of California demonstrates that there was no thought whatsoever in the minds of the framers of that document in opposition to or of hostility to religion as such. They proposed to insure separation of church and state, and to provide that the power and the authority of the state should never be devoted to the advancement of any particular sect or denomination.

Gordon v. Bd. of Educ., 78 Cal. App. 2d 464, 472-73 (1947); *see, e.g., California Educ. Facilities Auth. v. Priest*, 12 Cal. 3d 593, 605 (1974) (No Aid Clause "has never been interpreted . . . to require governmental hostility to religion").

The constitutional concern reflected in the No Aid Clause – strict separation of church and state – predates the adoption of the No Aid Clause by two decades. In 1858, twenty-one years prior to the inclusion of the provision in the California Constitution, the Chief Justice of the California Supreme Court wrote: "When our liberties were acquired, our republican form of government adopted, and

our Constitution framed, we deemed that we had attained not only toleration, but religious liberty in its largest sense – a complete separation between Church and State." *Ex parte Newman*, 9 Cal. 502, 506 (1858). To suggest that the separationist sentiment reflected in the No Aid Clause was a product of the Blaine Amendment, which arose seventeen years after the decision in *Newman*, defies the historical record.[3]

In view of this interpretive and historical record, Petitioners' faint attempt to indict the motives of California's constitutional framers is unavailing.

3. The Reach Of The No Aid Clause Is Broad And Independent.

Taking a different tack, Petitioners next assert that the No Aid Clause – rather than a weapon of sectarian oppression – is instead an "obscure" provision with no "independent significance" whatsoever. (City, p. 7) Petitioners here allege that the Ninth Circuit has "cavalierly invent[ed] new state law" by enforcing the Clause at all. *Id.* In support, Petitioners offer the peculiar assertion that no previous decision applying the No Aid Clause has enforced it without separately addressing additional causes of action. *Id.* Petitioners omit to explain how this odd fact matters, since California courts have repeatedly

[3] Underscoring the neutral design of the California Constitution, the same convention that adopted the No Aid Clause in 1879 simultaneously amended article I, section 4 to "guarantee" – not merely "allow" – the free exercise of religion. *Sands v. Morongo Unified Sch. Dist.*, 53 Cal. 3d 863, 909 (1991) (Mosk, J., concurring).

identified the No Aid Clause as a separate and independent constraint upon government conduct. *See, e.g., Sands*, 53 Cal. 3d at 883; *California Teachers Ass'n v. Riles*, 29 Cal. 3d 794, 797-798 (1981); *Priest*, 12 Cal. 3d at 605 n.12; *County of Los Angeles v. Hollinger*, 221 Cal. App. 2d 154, 158 (1963). As the California Supreme Court has made plain, the No Aid Clause is "the definitive statement of the principle of government impartiality in the field of religion." *Priest*, 12 Cal. 3d at 604. The provision is hardly irrelevant.

As a corollary to this argument, Petitioners assert that the No Aid Clause is subordinate to the Establishment Clause. They base this claim on a recent decision of the California Supreme Court purportedly establishing that "the state *religion clauses* are no more protective than the federal Constitution." City, pp. 8-9 (italics added); *East Bay Asian Local Dev. Corp. v. State of California,* 24 Cal. 4th 693, 719 (2000). The claim flatly misstates the analysis of the state supreme court. The *East Bay* decision discusses only whether the No Preference Clause (article I, section 4) requires greater separation between church and state than does the federal Establishment Clause, and concludes that the Court "need not" decide that issue.[4] The opinion then discusses separately and at length plaintiff's No Aid Clause claim and makes no reference to any

[4] Petitioners' assertion is thus wrong with respect to the state No Preference Clause as well. *See Sands*, 53 Cal. 3d at 883; *Hart v. Cult Awareness Network*, 13 Cal. App. 4th 777, 792 (1993); *Woodland Hills Homeowners Org. v. Los Angeles Cmty. Coll. Dist.*, 218 Cal. App. 3d 79, 92 (1990); *Okrand v. City of Los Angeles*, 207 Cal. App. 3d 566, 571-72 (1989); *Feminist Women's Health Ctr., Inc. v. Philibosian*, 157 Cal. App. 3d 1076, 1092 (1984).

relationship between that independent provision and the federal guarantee. Petitioners' assertion that the provision is derivative of federal constitutional law is fiction.[5]

4. The No Aid Clause Applies To Governmental Support Of A Religious Purpose Or Use, Irrespective Of Whether The Recipient Of Aid Is Itself A Religious Organization.

Petitioners next seize on the purported fact that the No Aid Clause has only been employed to strike down government support of private religious organizations – as opposed to a secular organization engaged in a religious practice or use – and urge that the Association's religious display is thus outside the scope of the Clause. (City, pp. 8, 27-28; Assoc., pp. 11, 20-21) The plain language of the No Aid Clause reaches far beyond religious organizations, however, to bar governmental "aid of any . . . sectarian *purpose*. . . . " Cal. Const. art. XVI, sec. 5 (italics added). As the court explained in *Priest*, "[t]he section thus forbids more than the appropriation or payment of public funds to support sectarian institutions. It bans any official involvement, whatever its form, which has the direct,

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[5] Petitioners suggest that it is "arguable" that the No Aid Clause should be subject to Establishment Clause analysis based on opinions of the California Attorney General issued in 1955 and 1965. (City, p. 11 n.12) Both opinions predate the entire relevant body of California decisional law defining the unique contours of the No Aid Clause inquiry.

immediate, and substantial effect of promoting religious purposes."[6] 12 Cal. 3d at 605 n.12.

Accordingly, even accepting as true the Association's self-serving declaration that its objectives are purely secular (*cf.* Assoc. ER 229), the argument is without merit.[7] The Association's display of a towering Latin cross at the apex of the City's most prominent mountain is a sectarian purpose or use within the reach of the No Aid Clause.

5. The Ninth Circuit Properly Concluded That The Challenged Sale Provided Impermissible Aid To A Sectarian Use Or Purpose.

Petitioners finally propose a variety of reasons why the transaction at issue did not afford prohibited aid to a religious or sectarian purpose. Each argument fails.

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[6] Petitioners' characterization of No Aid Clause jurisprudence as involving only disputes arising from government aid to religious organizations is wrong as well. *See, e.g.*, *Hewitt v. Joyner*, 940 F.2d at 1571 (court invokes provision to strike down San Bernardino County's display of religious statuary on its own public parkland); *Priest*, 12 Cal. 3d at 605-06 (upholding an educational funding program on grounds that the benefits "are granted to sectarian and nonsectarian colleges on an equal basis; in *both cases* all aid for religious projects is strictly prohibited") (italics added).

[7] Both Petitioners challenge the opinion on grounds that it violated the free exercise rights of the Association. *See* Assoc., pp. 21-22; City, p. 19 n.22 (Association "has Free Exercise rights protected by the First Amendment if it wishes to espouse a religious viewpoint or engage in religious practices"). To assert that the Association is entitled to display the cross as a "religious practice[ ]" or an expression of its "religious viewpoint," but to simultaneously deny that the activity falls within the reach of the No Aid Clause, strains credulity.

a. The Ninth Circuit's Analysis Of Impermissible Aid Is Fully Consistent With California Precedent.

Citing the No Aid Clause analysis of the court in *East Bay,* Petitioners first assert that the Ninth Circuit "altogether failed to conduct any type of substantive analysis" of the holding in that decision. (City, p. 29) The claim is belied by the opinion itself, which carefully addressed the large body of California authority construing the Clause and specifically addressed *East Bay*. 294 F.3d at 1129-32.

Petitioners' attempt to align this case with the facts of *East Bay* is unavailing. There the court emphasized that no impermissible aid to religion was afforded by a statute exempting religious property from landmark regulations because the property was simply left "in the status it otherwise occupied." *East Bay*, at 721. Here, the entire point of the transaction was to *transform* the status of the property from a government-endorsed religious display to a privately-held war memorial. Far from "step[ping] out of the way" of religion, as in *East Bay* (*id.* at 729), the City engineered a transaction that increased the likelihood that certain religious bidders – with no existing rights, interests, or special claims to the subject property, unlike the organizations in *East Bay* – would prevail in obtaining it. *East Bay* condemns the challenged transaction rather than validates it.[8]

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[8] In an effort to place the case within the scope of *East Bay*, the Association argues that the transaction "simply left the cross with the same ownership status as before, in the hands of the Association." (Assoc., p. 20) The argument is hardly helpful to Petitioners' cause: if

(Continued on following page)

Petitioners also contend that a fair-market-value sale of property to the highest bidder cannot violate the No Aid Clause. (City, pp. 8, 10, 26-28; Assoc., pp. 14-18) To the extent that Petitioners merely assert the legality of an arms-length sale to the highest bidder, where all potential purchasers are accorded equal opportunity to obtain the property, the contention knocks at an open door. *Christian Sci. Reading Room Jointly Maintained v. City & County of San Francisco*, 784 F.2d 1010, 1014-15 (9th Cir. 1986); *Woodland Hills*, 218 Cal. App. 3d at 85-86. This uncontested principle, however, has no application to the facts of this case. The property was *not* made available on an equal basis to all potential purchasers, as required by the No Aid Clause, because bidders seeking to maintain the cross enjoyed a significant relative advantage based on the fact that they did not have to budget additional monies to satisfy the war-memorial use restriction.[9]

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the transaction was designed to preserve the Association's control over the cross property, its unconstitutionality is manifest.

[9] This fact refutes Petitioners' assertion that the challenged sale was "modeled" after the remedy in an "essentially identical" case involving the Mt. Davidson cross in San Francisco. (City, p. 3; Assoc., p. 4) The City of San Francisco imposed no use restriction whatsoever upon the auctioned cross property, in contrast to the narrow "war-memorial" use restriction imposed here. (Appellant's Supplemental Excerpts of Record In Support of Reply ["SR"], 3-4) The distinction is pivotal: the latter transaction imposed substantial additional costs upon bidders seeking to display a non-Christian memorial, while the former imposed no costs at all.

b. The Record Supports The Court's Conclusion That The Display Of The Cross Is A Religious Use Or Purpose.

Petitioners implausibly assert that no aid was provided to a religious use or purpose because "the cross, in and of itself, is not inextricably intertwined with a religious message." (City, p. 29) The argument conflicts with decades of precedent and has already been rejected for purposes of this litigation.

Petitioners asserted from the beginning of this action that the cross is not a religious symbol. The District Court rejected the claim, the Ninth Circuit affirmed, and this Court denied review. *See Murphy v. Bilbray*, 782 F. Supp. at 1429. The question is thus settled between the parties and is the law of the case. *Old Person v. Brown,* 312 F.3d 1036, 1039 (9th Cir. 2002).

The argument is also unavailing. As the District Court explained, "[t]hat the Latin cross is the principal symbol, and a universally recognized symbol, of Christianity, however, is beyond dispute." *Murphy v. Bilbray,* 782 F. Supp. at 1429. Countless authorities corroborate the conclusion. *See* 782 F. Supp. at 1429 n.26; *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 620 (9th Cir. 1996); *Carpenter v. City and County of San Francisco,* 93 F.3d 627, 630 (9th Cir. 1996).[10]

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[10] Petitioners assert that this analysis condemns the "crosses at Arlington National Cemetery, [which] would also have to be deemed unconstitutional" based on their religious content. (City, p. 29) Crosses in a public cemetery are constitutionally permissible, however, not because they lack religious content but because that content is not reasonably attributable to government. Individual crosses spread across

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c. The Record Supports The Court's Analysis Of The Ownership Of The Cross.

Petitioners argue that the City provided no aid to religion because the Association purportedly owns the cross, thus precluding the City from "giv[ing] it away." (City, p. 26; Assoc., pp. 11, 19) The argument fails as a matter of fact and law.

First, the premise is false. The opinion below expressly acknowledged the possibility that the Association owned the cross and explained why it made no difference. 294 F.3d at 1132 n.6. Thus the City takes the Ninth Circuit to task for failing to apprehend a fact that its decision acknowledged and addressed.

Second, even if the Court of Appeals had premised its ruling upon the City's ownership, the record would support the analysis. Indeed, for the City to castigate the Ninth Circuit for misstating the "undisputed" record in this respect is remarkable, given its own representations to that court. The City's supplemental *en banc* brief begins with the observation that "[t]he City of San Diego . . . sold the cross and the surrounding developed property to the highest bidder," and then proceeds to make express reference to the "sale" of the cross at least ten additional times – a factual impossibility if the Association, rather than the City, already owned it. *See* Appellee City of San

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a cemetery and interspersed with symbols of other religious faiths, all of which have been selected and installed at the direction of the families of the interred, hardly convey the same message of endorsement as a single, towering cross at the apex of a public park.

Diego's Supplemental Br., filed March 18, 2002, pp. 1, 6, 7, 10, 11, 13, 17, 20; *see also* ER 56, lines 5-6. If the Ninth Circuit misstated the facts in this regard, the City need not look far for an explanation.

The City's evident confusion reflects the dubious nature of its current assertion. Over the course of this litigation, Petitioners have periodically argued that the City has never owned the cross (and thus, purportedly, has no responsibility for its display), based on nothing more than Petitioners' declaration of the alleged fact. *See, e.g.*, City, p. 27 n.30 (citing Association's bid proposal). The record, however, establishes that the City – not the Association – owns the cross under California law.[11]

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[11] The 24-ton cross is plainly a "fixture" erected by the Association upon City land. *See* City's Supplemental Br., p. 13 n.14; Cal. Civ. Code § 660. California Civil Code section 1013 thus determines ownership:

> When a person affixes his property to the land of another, without an agreement permitting him to remove it, the thing affixed . . . belongs to the owner of the land, unless he chooses to require the former to remove it or the former elects to exercise the right of removal [applicable when an individual affixes property in the good faith but erroneous belief that he owns the property].

The record reflects no evidence of an agreement permitting the Association to remove the cross, no effort by the City to require the Association to do so, nor the slightest suggestion that the parties contemplated that the symbol would ever be removed. In the absence of such evidence, the record establishes that the cross is owned by the City. This conclusion is corroborated by the only property description in the record that references the cross – the City's designation of the property as an historic landmark in 1991. (Assoc. ER 231) That document refers to the "historical site designation of Mount Soledad Park and Memorial Cross which is all of that property dedicated by action of the City Council as Mount Soledad Park."

Finally, whether the City ever owned the cross is constitutionally irrelevant. In either case, the transfer of the symbol was accomplished at the City's direction, design, and considerable expense. To suggest that the Association – if it indeed owned the symbol – played any role in structuring this transaction or carrying it out defies the facts; its interest in the entire parcel had already been voided by the District Court's 1997 Order, and the requirement that it quitclaim that interest upon repayment of its purchase price was a *fait accompli*. The Association was merely a passive bystander to the City's use of its power and resources to engineer the transaction. This record plainly supports the conclusion that the City's power and prestige were enlisted to aid a religious purpose, in violation of the No Aid Clause.

d. The Record Supports The Court's Conclusion That The Transaction Favored Bidders Seeking To Preserve The Cross.

Petitioners offer a variety of arguments why, on these particular facts, no relative advantage was afforded to purchasers who sought to satisfy the war-memorial use restriction by preserving the existing cross. Each fails.

Petitioners first argue that any purchaser seeking to remove the cross and construct a new, non-Christian memorial need only sell the cross to some willing purchaser "for a profit" to recoup its value. (City, p. 18 n.19; Assoc., p. 19) Without reaching the improbable assumptions underlying the claim – that a market exists for the cross and that any meaningful value would be placed upon it – the argument founders upon Petitioners' own representations to the lower courts. In previous

briefing, the City has instructed that "[r]emoval of the cross will likely result in its destruction. It was damaged when erected and is thought to have become more fragile over the years." (Defendant's Br., filed August 28, 1995, p. 2 n.1) How a purchaser might hope to recoup the value of the cross, once it has been reduced to rubble, is not evident.

Petitioners next argue that any purchaser could have simply requested that the Association remove the cross – in the words of the Association, to have demanded that the Association "get its cross off what is now the private property of the bidder." (Assoc., p. 19) The argument rests on the false premise that the land was sold separately from the fixtures upon it. As set forth above, California law makes plain that the cross and the land upon which it sits constitute a single piece of realty. Nothing in the terms of the transaction suggested that the Association bore an additional legal obligation to clear the land of its fixtures before quitclaiming the property to the next purchaser. (ER 19) Nor did the City's bid solicitation make any representation that the City would provide such a service; to the contrary, the plain implication was that the purchaser would get the property, cross and all. (ER 18) To pose the self-serving possibility that the Association or the City *might* nonetheless have simply removed the cross for the benefit of another purchaser – for free – despite the absence of any legal obligation to do so, is empty conjecture.

Finally, both Petitioners argue that no aid was provided because any purchaser valuing the cross would have factored that value into its bid price. (City, p. 26; Assoc., p. 14) The argument is difficult to decipher, as it appears to miss the entire point of the Ninth Circuit's analysis. The Court of Appeals' ruling turns on the fact that the terms of

the transaction required purchasers to use the property as a war memorial but provided the means to satisfy that restriction only to those purchasers intending to display the cross. All others were required to reserve funds for removal of the cross and construction of a new memorial to satisfy the use restriction – monies that the favored bidders could fully devote to the purchase price. This relative disadvantage increased the likelihood that bidders seeking to preserve the cross would submit the highest bid and obtain the property precisely because they could increase their bid to reflect the entire anticipated investment.

e. Evidence Of The Association's Investment In The Property Is Outside The Record And Is Irrelevant To The Constitutional Analysis.

Finally, Petitioners argue that no aid was afforded by the transaction because the Association allegedly has spent over a million dollars to improve the property since purchasing it. (Assoc., pp. 18-19) The factual assertion is outside the record and is irrelevant to the constitutional inquiry.

Twice the Association sought to augment the record with facts regarding subsequent improvements it allegedly has made to the Mount Soledad property, first before the original three-judge panel and again before the *en banc*

court.[12] Both motions were denied, reflecting the Ninth Circuit's appropriate focus on the legality of the transaction considered by the District Court rather than the conduct of the Association thereafter. It is highly inappropriate for the Association to urge this Court's consideration of materials that were not before the District Court and that have twice been excluded from the appellate record on that basis. *United States v. Elias*, 921 F.2d 870, 874 (9th Cir. 1990).

The facts are irrelevant in any event. It is undisputed that the cross property, without any improvements at all, would have satisfied the use restriction imposed by the City.[13] That the Association has chosen to invest additional sums to improve the property does not alter the fact that it was spared the additional expense of removing the cross and constructing a new memorial in its place, and thus enjoyed a significant relative advantage over all other bidders wishing to erect a non-Christian memorial.[14]

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[12] *See* motions filed November 16, 2000 (denied by Order dated December 1, 2000), and March 18, 2002 (denied by Order dated March 26, 2002).

[13] There is no question that the preexisting cross site qualified as an "historic war memorial" for purposes of the City's use restriction: the City had already defined the property in precisely those terms. (Assoc. ER 231) The City's consideration of bids from purchasers wishing to preserve the cross also reflected its judgment that their intention to "maintain the current war memorial" satisfied the use restriction without more. (Assoc. ER 99, 109, 213, 259, 297)

[14] It is unclear whether the Association is attempting to suggest that some significant portion of its alleged $1 million expenditure is associated with its maintenance of the cross, thus implying that the removal of the symbol and construction of a new memorial may have been a less costly alternative. (*See* Assoc., pp. 18-19) If so, the record

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II. PETITIONERS' FEDERAL CONSTITUTIONAL OBJECTIONS REST ON A REMEDY NOT REQUIRED BY THE OPINION AND SPECIFICALLY REJECTED BY RESPONDENT.

While Petitioners acknowledge that the Court did not "discuss[ ] any particular remedy," they still assert that the "practical consequences" of the opinion "effectively require[ ]" that the City either (1) act with hostility toward religion by destroying the cross prior to any sale, or (2) discriminate on the basis of religious viewpoint by subsidizing only those purchasers seeking to remove the religious symbol. (City, p. 15) Based exclusively on these two postulated "consequences," the City asserts that the decision of the Ninth Circuit violates federal constitutional provisions concerning free speech (pp. 17-18), free exercise (pp. 18-20), religious establishment (pp. 16-17), and equal protection (pp. 20-21).

Any complaint resting on the postulated outcome of an opinion that admittedly requires no specific remedy at all is on its face premature. If the City believes that any particular remedy ordered on remand is at odds with its constitutional obligations, it can appeal. The matter can

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defeats the claim. The Association submitted with its bid a proposed five-year budget detailing its anticipated costs for maintaining the property, reflecting its 45 years of experience maintaining the very same cross site. (Assoc. ER 254) The only budget item that addresses maintenance of the cross is an entry for "repairs," which would encompass not merely the cross but also the surrounding memorial. The total five-year outlay for such repair work is $3,316. (*Id.*) The costs for maintaining the cross itself are some fraction of this amount.

then be addressed concretely rather than in a vacuum of supposition.

More fundamentally, Petitioners' intimated "practical consequences" are themselves fantasy. Petitioners assert that the opinion will require that the cross be destroyed before any sale, but offer no explanation why. Presumably Petitioners refer here to the Court's concern that the sale placed a burden on buyers seeking to erect a non-Christian memorial because they alone would incur the cost of removing the cross. Far from requiring that it be destroyed, however, this infirmity could be addressed by the City's simple offer to deliver the property with or without the cross, at the buyer's direction. The City then assures that all bidders may receive the property in the condition they desire, with "hostility" toward none.[15]

Petitioners also worry that the City may be forced to subsidize only those bidders intending to erect a non-Christian memorial, since others will obtain one ready-made. Again, the concern is fiction. In any future transaction, the City could simply offer the winning bidder a set amount of financial assistance to be used in the buyer's discretion to either construct a new memorial or improve the existing one – thus affording all bidders equal treatment

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[15] The City argues that this alternative remedy would impermissibly subsidize only those bidders seeking to remove the cross and erect a new memorial. (City, p. 16 n.18) The argument ignores the obvious fact that, for bidders seeking to display a Christian memorial, the City would be transferring one ready-made. To provide the former bidders with property unencumbered with a religious fixture, while providing the latter with property already containing a completed war memorial, is hardly a one-sided subsidy.

with regard to their ability to satisfy the use restriction.[16] Alternatively, the City could simply remove the war-memorial use restriction and impose instead a restriction upon the property that requires no construction at all. *See, e.g., Freedom From Religion Found. v. City of Marshfield*, 203 F.3d 487, 490 (7th Cir. 2000) (*en banc*) (use restriction for "public park purposes"); SR 2-4 (use restriction not imposed on sale of cross property in San Francisco).

The Ninth Circuit has instructed that such questions first be addressed by the District Court. These alternatives to the Petitioners' dim forecast thus merely illustrate the range of options available on remand. As the examples demonstrate, however, no reasonable construction of the opinion requires anything of the City but neutrality.

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[16] The City argues that this alternative "fails to address the concerns raised by the Ninth Circuit as it does not improve the financial position of those bidders wishing to remove the cross relative to those bidders wishing to maintain it." (City, p. 16 n.18) Since Respondent disagrees, no party to these proceedings will raise the objection. Moreover, the argument betrays a fundamental misapprehension of the Ninth Circuit's ruling, which requires only that bidders be placed on an equal footing with respect to their ability to purchase the property and satisfy the use restriction. If the City stipulates that a memorial constructed with the subsidy will satisfy the use restriction, the requirement is met.

III. THE ASSERTED VIOLATION OF THE ASSOCIATION'S FIRST AMENDMENT RIGHTS, BASED ON ITS PRESENT OCCUPANCY OF THE PROPERTY, IMPROPERLY SEEKS TO FORECLOSE JUDICIAL REVIEW.

In conclusion, Petitioners assert that Respondent's challenge implicates the Association's First Amendment free-speech and free-exercise rights. (City, p. 18; Assoc., pp. 21-23) To the extent that Petitioners merely suggest that the Association is entitled to equal treatment in any sale, irrespective of its religious viewpoint, there is no dispute. The opinion provides for nothing less. (*Supra*, at 24-26)

Petitioners, however, offer a far broader assertion of expressive rights. They argue that the Association and its plaque-holders have First Amendment rights that preclude or circumscribe the federal courts' ability to review the challenged transaction based simply upon the Association's present occupancy of the cross property. As the Association states, "[t]he bottom line is that it is far too late in the day to complain any further about a cross on public land, particularly based on the California Constitution, which is superceded by rights under the U.S. Constitution." Assoc., p. 22; *see* City, p. 18 (opinion allegedly "violated the vested rights of hundreds of plaque holders who invested substantial money on the memorial in reasonable reliance upon the original sale").

Petitioners assert this claim of entitlement despite the fact that they received express notice of Respondent's intention to challenge the transaction – and were specifically advised by him that "the City and the prospective buyer [should] not take any further action or incur any further expenses in this matter until this motion is heard by the court" – but nevertheless chose to go forward with

the sale and property improvements. (Respondent's Appendix 1) Indeed, even if Respondent had provided no notice at all, the Association had "actual notice of the pendency of the proceeding" and thus took the cross property "subject to any judgment that may be rendered" in this action. *Albertson v. Raboff*, 46 Cal. 2d 375, 379 (1956); Cal. Civ. Proc. Code § 1908(a)(2); *see Duncan v. Farm Credit Bank of St. Louis*, 940 F.2d 1099, 1101 (7th Cir. 1991) (state *lis pendens* rules govern federal court proceedings).

Having chosen to proceed at its own risk to begin work upon the property in the absence of a final judicial determination regarding the legality of the transaction, and in the face of Respondent's declared intention to challenge the sale, the Association remarkably declares that those very improvements upon the property – evidence of which has twice been barred from the appellate record – should now immunize the transaction from judicial review. As such, the argument is the constitutional equivalent of adverse possession: regardless of whether its claim to the land was legal in the first instance, the Association is there now and asserts an expressive right to stay put.

The claim is baseless. The Association's speech and free exercise interests arising from its current occupancy of the cross property are contingent upon, not independent of, the legality of its ownership. Unless and until it is determined that the City acted constitutionally in transferring the property to the Association, and thus that the Association's title is cleared of its present and obvious cloud, none of the Association's asserted interests in the

property – not merely those arising from the federal Constitution – can be recognized, let alone enforced.[17]

CONCLUSION

For the reasons set forth above, Plaintiff/Respondent Philip Paulson respectfully requests that the Petitions for a Writ of Certiorari filed in this matter by Defendant/Petitioner City of San Diego and Defendant/Petitioner Mt. Soledad Memorial Association be denied.

Respectfully submitted,

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[17] As to the plaque-holders, their remedy lies against Petitioners themselves. Having chosen to proceed with construction and irresponsibly represented to hundreds of plaque-purchasers that the property was ready for development, presumably without disclosing the pendency of this litigation and the risks and uncertainty attending that fact, Petitioners must answer for their improvident conduct.

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October 21, 1998

CASEY G. GWINN, ESQ.
City Attorney
Office of the City Attorney
1200 Third Avenue, Suite 1200
San Diego, CA 92101

Re: PHILIP K. PAULSON et al. v. CITY OF SAN DIEGO
Case No. Civ. No. 89-820-GT

Dear Mr. Gwinn:

Thank you for discussing this matter with me. This will confirm that I advised you of the likelihood that plaintiffs will object to the recent sale and transfer of land and that I anticipate filing a motion in that regard in the near future. This will also confirm that I suggested the City and the prospective buyer not take any further action or incur any further expenses in this matter until this motion is heard by the court. You advised me that the City and the buyer would probably decide to proceed with the transaction despite the knowledge that I will be filing opposition to the transaction on behalf of my clients.

Since we last spoke, the court issued its decision in the Mt. Helix case which I believes lends support to our position.

As soon as we are able to complete some additional discovery, we will be filing our opposition. If you have any

concerns or suggestions regarding the timing of the discovery and the filing of our opposition, please don't hesitate to contact me. I will be happy to cooperate with you in that regard.

Sincerely,

JAMES E. McELROY

JEM:jm

cc: Philip K. Paulson
Peter Irons